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# AUSTRALIA'S NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE ACT: ADDRESSING INDIGENOUS AND NON-INDIGENOUS INEQUITIES AT THE EXPENSE OF INTERNATIONAL HUMAN RIGHTS?

Jenna Gruenstein<sup>†</sup>

*Abstract:* In 2007, Australia passed the Northern Territory National Emergency Response Act ("NT Emergency Response Act"), ostensibly reacting to a recent report detailing exceedingly high levels of sexual abuse of Aboriginal children. This Comment argues that the NT Emergency Response Act likely violates Australia's obligations under the United Nations' ("U.N.") International Convention on the Elimination of All Forms of Racial Discrimination ("Racial Discrimination Convention"). The NT Emergency Response Act provides an opportunity for the Racial Discrimination Convention's enforcement body, the Committee on the Elimination of Racial Discrimination ("CERD"), to extend its application of the specialized guidelines for indigenous peoples beyond the land title and land use matters. The entire NT Emergency Response Act likely violates CERD's indigenous policies, as it was passed without the meaningful participation or informed consent of indigenous peoples affected by the Act. Specifically, the land title portions of the NT Emergency Response Act violate Australia's obligations under the Racial Discrimination Convention because they do not allow for indigenous peoples to use or control their own communal land.

CERD should expand its previous use of General Recommendation Number XXIII on Indigenous Peoples ("General Recommendation"), a 1997 CERD document that lists the specific responsibilities States parties have towards indigenous peoples. CERD should use the General Recommendation to analyze the non-land title provisions of the NT Emergency Response Act through a model that combines the informed consent provisions of the General Recommendation with the traditional nondiscrimination norm of the Racial Discrimination Convention. Combining the informed consent and nondiscrimination modes of analysis enables CERD to better address the unique and sensitive issues related to indigenous rights; by so doing, CERD will likely find that many of the non-land title provisions of the NT Emergency Response Act violate the Racial Discrimination Convention.

## I. INTRODUCTION

Raw statistics highlight the disparity between the quality of life of indigenous Australians and that of non-indigenous Australians. The life expectancy for indigenous males is seventeen years below the national average.<sup>1</sup> In 2005, the rate of indigenous incarceration was twelve times

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<sup>1</sup> AUSTRALIAN GOVERNMENT DEPARTMENT OF HEALTH AND AGEING, DEPARTMENT OF HEALTH AND AGEING FACTBOOK 2006 135 (2006), available at <http://www.health.gov.au/internet/wcms/publishing.nsf/Content/Factbook2006-1>.

higher than that of non-indigenous peoples.<sup>2</sup> In the predominantly indigenous Northern Territory (“NT”), the level of alcohol abuse classified as serious enough to pose a risk of long-term harm is 17.1%, twice the national average.<sup>3</sup> Even more disturbing is the recent Little Children Are Sacred Report, which found that sexual abuse of indigenous children is “common, widespread and grossly under-reported.”<sup>4</sup>

In reaction to the Little Children Are Sacred Report, and at the urging of Prime Minister John Howard, the Australian Parliament in August 2007 passed the NT Emergency Response Act legislative package—comprised of the NT Emergency Response Act of 2007, the Families, Community Services & Indigenous Affairs & Other Legislation Amendment (NT Emergency Response & Other Measures) Act of 2007, and the Social Security & Other Legislation Amendment (Welfare Payment Reform) Act.<sup>5</sup> While the Prime Minister relied on the report to justify the legislation, there is little correlation between the report’s recommendations and the NT Emergency Response Act.<sup>6</sup> The NT Emergency Response Act is a comprehensive piece of legislation that goes well beyond directly targeting the high levels of sexual abuse of children in the NT. It contains measures intended to address a myriad of issues, including: banning alcohol in certain areas of the NT,<sup>7</sup> setting new regulations that allow the government to withhold portions of certain people’s—predominantly Aboriginal people’s—welfare checks,<sup>8</sup> allowing for the government to assume five-year leases of Aboriginal lands,<sup>9</sup> increasing federal law enforcement oversight of crimes

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<sup>2</sup> Lucy Snowball & Don Weatherburn, *Indigenous Over-Representation in Prison: The Role of Offender Characteristics*, NSW BUREAU OF CRIME STATISTICS & RESEARCH, CRIME & JUST. BULL.: CONTEMP. ISSUES IN CRIME AND JUST. 99 (Sept. 2006), [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/CJB99.pdf/\\$file/CJB99.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB99.pdf/$file/CJB99.pdf) (last visited Jan. 2, 2008).

<sup>3</sup> PAT ANDERSON & REX WILD, LITTLE CHILDREN ARE SACRED: REPORT OF THE NORTHERN TERRITORY BOARD OF INQUIRY INTO THE PROTECTION OF ABORIGINAL CHILDREN FROM SEXUAL ABUSE 16 (2007), available at [www.nt.gov.au/dcm/inquiry/sacred/pdf/bipacs\\_final\\_report.pdf](http://www.nt.gov.au/dcm/inquiry/sacred/pdf/bipacs_final_report.pdf).

<sup>4</sup> *Id.* (emphasis in original).

<sup>5</sup> Northern Territory National Emergency Response Act, 2007 (Austl.) [hereinafter NT Emergency Response Act]. For the purposes of this paper, NT Emergency Response Act refers to the legislative package comprised of the Northern Territory National Emergency Response Act, 2007, the Families, Community Services & Indigenous Affairs & Other Legislation Amendment (NT Emergency Response & Other Measures) Act, 2007, [hereinafter Families, Community Services & Indigenous Affairs Act] and the Social Security & Other Legislation Amendment (Welfare Payment Reform) Act, 2007 [hereinafter Welfare Payment Reform Act].

<sup>6</sup> AUSTRALIAN GOVERNMENT DEPARTMENT OF PARLIAMENTARY SERVICES, NORTHERN TERRITORY NATIONAL EMERGENCY RESPONSE BILLS 2007—INTERIM BILLS DIGEST, NO. 18, at 4-5 (Aug. 7, 2007), <http://www.aph.gov.au/library/pubs/bd/2007-08/08bd018.pdf> (last visited Jan. 2, 2008) [hereinafter PARLIAMENTARY SERVICES BILLS DIGEST].

<sup>7</sup> See NT Emergency Response Act, *supra* note 5, part 2(12)(2).

<sup>8</sup> See Welfare Payment Reform Act, *supra* note 5.

<sup>9</sup> See NT Emergency Response Act, *supra* note 5, part 4(1).

against indigenous children,<sup>10</sup> and revising the sentencing regime to forbid any special dispensation for indigenous offenders by taking into account customary law.<sup>11</sup> In fact, many of the provisions in the NT Emergency Response Act, including those regarding land reform, are not only unrelated to combating the abuse of children, but were also not mentioned in the report that the Howard administration used to justify its policies.<sup>12</sup>

Portions of the NT Emergency Response Act are likely in violation of Australia's international human rights obligations. Specifically, the NT Emergency Response Act appears to be at odds with Australia's obligations as a party to the Racial Discrimination Convention, a U.N. treaty.<sup>13</sup> The Racial Discrimination Convention is one of the preeminent international instruments for the protection of human rights<sup>14</sup> and prohibits States parties from making "any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin."<sup>15</sup> Exceptions to the ban on discrimination are allowed in the form of "special measures"—essentially permitting the enactment of affirmative action policies—which must be narrowly tailored to the purpose of ensuring the "adequate advancement" of racial groups or people in need of protection.<sup>16</sup> CERD, an autonomous body composed of eighteen elected members who serve in their private capacities, is tasked with enforcing the Racial Discrimination Convention.<sup>17</sup>

In addition to its potential violation of the Racial Discrimination Convention, the NT Emergency Response Act may also violate CERD's General Recommendation. Pursuant to the Racial Discrimination Convention, CERD adopted the General Recommendation in 1997.<sup>18</sup> The General Recommendation requires States parties to ensure that indigenous people have "equal rights in respect of effective participation in public life

<sup>10</sup> See Families, Community Services & Indigenous Affairs Act, *supra* note 5, part 2.

<sup>11</sup> See NT Emergency Response Act, *supra* note 5, part 6.

<sup>12</sup> Sarah Pritchard, The Northern Territory Emergency Response Legislation: Notes for Seminar at the Human Rights and Equal Opportunity Comm'n, ¶ 32 (Sept. 17, 2007), [http://www.hreoc.gov.au/legal/seminars/speeches/sarah\\_pritchard.html](http://www.hreoc.gov.au/legal/seminars/speeches/sarah_pritchard.html) (last visited Jan. 2, 2008).

<sup>13</sup> United Nations International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter Racial Discrimination Convention]. Australia ratified the treaty on Sept. 30, 1975.

<sup>14</sup> Michael O'Flaherty, *Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, in INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 162, 162 (Sarah Pritchard ed., 1998).

<sup>15</sup> See Racial Discrimination Convention, *supra* note 13, art. 1(1).

<sup>16</sup> *Id.* art. 1(4).

<sup>17</sup> MICHAEL O'FLAHERTY, HUMAN RIGHTS AND THE U.N.: PRACTICE BEFORE THE TREATY BODIES 88 (1996).

<sup>18</sup> U.N. Committee on the Elimination of Racial Discrimination [hereinafter CERD], *General Recommendation No. 23: Indigenous Peoples*, contained in U.N. Doc. A/52/18, annex V (Aug. 18, 1997) [hereinafter *General Recommendation No. 23*].

and that no decisions directly relating to their rights and interests are taken without their informed consent.”<sup>19</sup> Furthermore, the General Recommendation encourages the protection of indigenous peoples’ right to “own, develop, control and use their communal lands, territories and resources.”<sup>20</sup>

If CERD evaluates the NT Emergency Response Act, it will likely find that certain elements of it are discriminatory under the standards mandated by the Racial Discrimination Convention, particularly when analyzed under the specialized requirements of the General Recommendation. Part II of this Comment assesses the Racial Discrimination Convention and CERD’s ability to effectively respond to alleged discriminatory practices of States parties. In particular, it demonstrates how the General Recommendation impacts CERD’s ability to monitor indigenous land issues by providing a framework with which to analyze such issues. Part III argues that under the analytic framework applied to past indigenous land title violations, CERD should find that the land title portions of the NT Emergency Response Act violate Australia’s obligations under the Racial Discrimination Convention. Part IV argues that CERD should expand its previous use of the General Recommendation and analyze non-land use provisions of the NT Emergency Response Act through a model that combines the informed consent provision of the General Recommendation with the traditional nondiscrimination norm. This combined analysis will enable CERD to better address the unique and sensitive issues related to indigenous rights. Such a combined analysis of the NT Emergency Response Act demonstrates that the NT Emergency Response Act violates the Racial Discrimination Convention.

The extent of Australia’s violation of the Racial Discrimination Convention is somewhat unclear at this point, in large part because of the lack of scrutiny of the NT Emergency Response Act before its passage. The very recent passage of the Act, combined with its length—500 pages—and the speed with which it was passed—a little over a week—limit the amount of available information and analysis of the Act’s potential impact. Thus, while this Comment applies the information currently available, CERD is better equipped to fully address potential violations, as it may question the Australian government directly and demand further information about the new policies.<sup>21</sup> Additionally, while CERD will likely analyze many of the

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<sup>19</sup> *Id.* art. 4(d).

<sup>20</sup> *Id.*

<sup>21</sup> See Karl Josef Partsch, *The Committee on the Elimination of Racial Discrimination*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 354-56 (Philip Alston ed., 1992).

provisions contained within the NT Emergency Response Act for potential discrimination, the scope of this paper is limited to address only those provisions most likely to violate the Racial Discrimination Convention: the withholding of welfare checks, the banning of alcohol and pornography in certain Aboriginal lands, and the assumption of five-year leases.

It is important to note that on September 13, 2007, the U.N. General Assembly overwhelmingly adopted the Declaration on the Rights of Indigenous Peoples (notably, Australia was one of only four dissenting votes).<sup>22</sup> Like the General Recommendation, the Declaration emphasizes the importance of informed consent when implementing legislation that impacts indigenous peoples, and may well be a useful tool to challenge the NT Emergency Response Act.<sup>23</sup> However, because of its recent passage it has yet to be applied, and thus CERD may remain, at least for the present time, the most effective method to challenge the Act.

## II. CERD'S EXPANDING MANDATE AND PAST SCRUTINY OF INDIGENOUS RIGHTS MAKE IT WELL-SUITED TO EVALUATE THE NT EMERGENCY RESPONSE ACT

The Racial Discrimination Convention is one of the most widely ratified of the U.N. treaties, which gives its enforcement body, CERD, substantial international weight.<sup>24</sup> Despite its limited enforceability mechanisms,<sup>25</sup> the Racial Discrimination Convention is a binding treaty and as such, States parties are obligated to comply with its requirements.<sup>26</sup> Moreover, CERD has recently created procedures to ensure accessibility to the body, allowing individuals and groups impacted by discriminatory practices direct access to bring their concerns to CERD's attention.<sup>27</sup> Additionally, CERD's passage of the General Recommendation signaled not only that its mandate included indigenous rights issues, but also that CERD would pay special attention to these issues.<sup>28</sup> Past CERD decisions applying the General Recommendation demonstrate its willingness to address

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<sup>22</sup> Press Release, U.N. General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples: 'Major Step Forward' Towards Human Rights for All, Says President, G.A. 10612 (Sept. 13, 2007), <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (last visited Jan. 2, 2008).

<sup>23</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 19, U.N. Doc. A/Res/61/295 (2005).

<sup>24</sup> See *infra* note 43 and accompanying text.

<sup>25</sup> See *infra* note 44-47 and accompanying text.

<sup>26</sup> See Partsch, *supra* note 21, at 341-42.

<sup>27</sup> See Racial Discrimination Convention, *supra* note 13, art. 14.

<sup>28</sup> See General Recommendation No. 23, *supra* note 18.

indigenous issues.<sup>29</sup> Although CERD's involvement with these issues has thus far been predominantly focused on indigenous land rights matters,<sup>30</sup> the General Recommendation encompasses more than just land rights, and CERD can effectively use it to address the issues raised by the NT Emergency Response Act's passage.

A. *Recent Developments Demonstrate CERD's Expanded Mandate and Increased Accessibility*

Pressured by Third World countries to act against apartheid in South Africa, the U.N. adopted the Racial Discrimination Convention on December 21, 1965.<sup>31</sup> The Racial Discrimination Convention mandates that its States parties condemn racial discrimination and take "all appropriate means" to eliminate racial discrimination and promote racial tolerance.<sup>32</sup> The Racial Discrimination Convention defines racial discrimination as:

Any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.<sup>33</sup>

The Racial Discrimination Convention allows for certain exceptions to the ban on racial discrimination. Specifically, it allows for special measures, essentially affirmative action policies, taken for the "sole purpose of securing adequate advancement of certain racial or ethnic groups."<sup>34</sup> These special measures must end once their objectives have been achieved.<sup>35</sup> Differentiations between racial groups are allowed when a government shows a demonstrable, rational relation between the discriminatory policies and the advancement of a particular racial group.<sup>36</sup>

The Racial Discrimination Convention is enforced by CERD,<sup>37</sup> an autonomous body that is "'linked to'—not integrated in or absorbed by—the

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<sup>29</sup> See *infra* note 56 and accompanying text.

<sup>30</sup> *Id.*

<sup>31</sup> See Partsch, *supra* note 21, at 339.

<sup>32</sup> See Racial Discrimination Convention, *supra* note 13, art. 2(1).

<sup>33</sup> *Id.* art. 1(1).

<sup>34</sup> *Id.* art. 1(4).

<sup>35</sup> *Id.*

<sup>36</sup> MYRES S. MCDUGAL, ET. AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 596 (1980).

<sup>37</sup> See Racial Discrimination Convention, *supra* note 13, art. 8; see also O'FLAHERTY, *supra* note 17, at 88.

U.N. system.”<sup>38</sup> CERD is tasked with reviewing the routine reports that States parties are required to submit.<sup>39</sup> Upon receiving a state’s report, CERD will hold a public session in which its members may present any questions or comments, to which the state’s representative is usually allowed to respond.<sup>40</sup> CERD then adopts “Concluding Observations” on the country’s report, wherein it addresses concerns raised by the report and makes suggestions and recommendations on how the state can better comply with the Racial Discrimination Convention.<sup>41</sup> These Concluding Observations are included in CERD’s annual report to the U.N. General Assembly.<sup>42</sup>

One reason CERD is well-situated to investigate alleged discriminatory practices is that the Racial Discrimination Convention is one of the most widely ratified principal human rights instruments.<sup>43</sup> However, CERD does not have formal judicial powers, nor is it generally able to refer issues of concern to another body such as the International Court of Justice.<sup>44</sup> Nonetheless, the group has increasingly sought to exercise quasi-judicial powers by issuing more detailed opinions and suggestions.<sup>45</sup> However, with only limited enforcement abilities, CERD’s opinions and remarks often go unheeded.<sup>46</sup> Like many other U.N. committees, CERD’s most effective enforcement power may be through the political pressure of “naming and shaming.”<sup>47</sup>

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<sup>38</sup> See Partsch, *supra* note 21, at 343.

<sup>39</sup> See Racial Discrimination Convention, *supra* note 13, art. 9; see also Michael O’Flaherty, *The Committee on the Elimination of Racial Discrimination: Non-governmental Input and the Early Warning and Urgent Procedure*, in *INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS*, *supra* note 14, at 151-52 (“States are obliged to submit reports to the Committee one year after the [Racial Discrimination] Convention comes into effect for the State and thereafter every two years, on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention.”).

<sup>40</sup> See O’FLAHERTY, *supra* note 17, at 91.

<sup>41</sup> See O’Flaherty, *supra* note 39, at 154-55.

<sup>42</sup> *Id.* at 155.

<sup>43</sup> *Id.* at 163 (stating that as of 1996, 150 States had ratified the Racial Discrimination Convention, making it the second most ratified human rights instrument after the International Convention on the Rights of the Child).

<sup>44</sup> See Racial Discrimination Convention, *supra* note 13, art. 22 (permitting disputes, only between States parties, that cannot be settled by negotiation to be referred to the International Court of Justice at the request of any party to the dispute); see also Michael Banton, *Decision-Taking in the Committee on the Elimination of Racial Discrimination*, in *THE FUTURE OF U.N. HUMAN RIGHTS TREATY MONITORING* 55-57 (Philip Alston & James Crawford eds., 2000).

<sup>45</sup> See Banton, *supra* note 44, at 55-56.

<sup>46</sup> CHRISTOF HEYNS & FRANS VILJOEN, *THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL* 26 (2002) (stating that “[i]n many instances it is clear that concluding observations are being ignored” by the states at which they are directed).

<sup>47</sup> See Geoffrey W.G. Leane, *Indigenous Rights Wronged: Extinguishing Native Title in New Zealand*, 29 *DALHOUSIE L. J.* 41, 73 (2006) (stating that “in the absence of effective compliance and



While the original purpose of CERD—to eradicate apartheid in South Africa—has been achieved, CERD has nevertheless maintained its relevance in the field of human rights.<sup>48</sup> In 1995, CERD clarified its mandate and stated that the Racial Discrimination Convention “was directed against all forms of racial segregation and not just apartheid.”<sup>49</sup> Recent developments expanded CERD’s ability to investigate allegations in the interim between states’ reports.<sup>50</sup> In 1993, CERD created “early warning and urgent action procedures” to address violations in a timely and proactive manner.<sup>51</sup> These procedures allow CERD to examine any troubling situation, whether or not a state has submitted a report or filed a formal complaint.<sup>52</sup> Additionally, for those countries that opted in, as did Australia,<sup>53</sup> CERD can investigate claims asserted by individuals or groups that allege they are victims of violations of the Racial Discrimination Convention.<sup>54</sup> These procedures allow any person or group to approach CERD or its members and request an investigation, providing indigenous groups access to CERD at the first sign of trouble.<sup>55</sup> Indigenous groups from Australia, New Zealand, and the United States have already utilized these procedures—either by filing complaints or lobbying CERD to investigate alleged violations.<sup>56</sup> The expansion of methods that allow affected parties to file complaints—individual petitions, early warning, or urgent action procedures—allows greater access to the CERD system and increases its relevance as an international human rights organization.

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enforcement powers international fora . . . are limited to ‘name and shame’ exercises”); see also Thio Li-ann, *Pragmatism & Realism Do Not Mean Abdication: A Critical and Empirical Inquiry into Singapore’s Engagement with International Human Rights Law*, 8 SING. Y.B. INT’L L. 41, 46 (2004) (reflecting on the emerging focus on “pressur[ing] states through ‘name and shame’ tactics” that rely on moral force, due to the generally weak enforcement mechanisms of international human rights committees).

<sup>48</sup> See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 228 (2004).

<sup>49</sup> See Banton, *supra* note 44, at 64.

<sup>50</sup> See ANAYA, *supra* note 48, at 231.

<sup>51</sup> CERD, *Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedures: Working Paper Adopted by the Committee on the Elimination of Racial Discrimination*, U.N. GOAR, 48th Sess., Supp. No. 18, Annex III, ¶ 8, U.N. Doc. A/48/18 (1993) (stating that CERD allows for “early-warning measures to address existing structural problems from escalating into conflicts... [and] urgent procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.”).

<sup>52</sup> See ANAYA, *supra* note 48, at 231.

<sup>53</sup> See HEYNS & VILJOEN, *supra* note 46, at 50 (stating that Australia filed the declarations necessary to “opt into” Article 14 on January 28, 1993).

<sup>54</sup> See Racial Discrimination Convention, *supra* note 13, art. 14; see also O’FLAHERTY, *supra* note 17, at 105.

<sup>55</sup> *Id.*; see also, ANAYA, *supra* note 48, at 231.

<sup>56</sup> See, e.g., CERD Decision 2(54) on Australia, U.N. Doc. A/54/18 (Mar. 18, 1999); see also CERD Decision 1(66) on New Zealand, *New Zealand Foreshore and Sea Bed Act 2004*, U.N. Doc. CERD/C/66/NZL/Dec.1 (Mar. 11, 2005); CERD Decision 1(68) on United States of America, U.N. Doc. CERD/C/USA/Dec.1 (Apr. 11, 2006).

B. *CERD's Active Role in Protecting Indigenous Rights Provides a Framework Within Which CERD May Analyze the NT Emergency Response Act*

While initially there might have been some question as to whether matters of indigenous rights fell under CERD's purview, the General Recommendation affirmed that the Racial Discrimination Convention applies to indigenous peoples.<sup>57</sup> It also emphasized the importance of allowing indigenous peoples to maintain their distinct cultural traditions as well as the need to protect the use of and control over their communal lands.<sup>58</sup> CERD has since utilized the General Recommendation to make specific recommendations to States parties found to be in breach of their duties under the Racial Discrimination Convention.<sup>59</sup> However, most of these recommendations have been limited to addressing land rights issues, due perhaps in part to the General Recommendation's clear policy on indigenous land use and control.<sup>60</sup>

1. *The General Recommendation Signals CERD's Willingness to Address Issues of Indigenous Rights and Provides a Framework to Do So*

The General Recommendation lays out CERD's position on the responsibilities of states to indigenous peoples within their borders and sends the message that indigenous issues fall under CERD's purview.<sup>61</sup> Specifically, Article 4 of the General Recommendation calls upon States parties to "recognize and respect indigenous distinct culture[s]," and ensure that no "decisions relating directly to the rights and interests [of indigenous peoples] are taken without their informed consent."<sup>62</sup> Article 5 calls on States parties to "recognize and protect the rights of indigenous people to own, develop, control, and use their communal lands."<sup>63</sup> The General Recommendation sent a definitive message to States parties that indigenous rights fit within CERD's jurisdiction and that it would analyze such matters under a specialized framework.<sup>64</sup> Without a specialized guideline,

<sup>57</sup> See *General Recommendation No. 23*, *supra* note 18.

<sup>58</sup> *Id.*

<sup>59</sup> See CERD Decision 2(54) on Australia, CERD Decision 1(66) on New Zealand, and CERD Decision 1(68) on United States of America, *supra* note 56; see also CERD Concluding Observations on Nigeria, ¶ 19, U.N. Doc. CERD/C/NGA/CO/18 (Mar. 27, 2007).

<sup>60</sup> See *General Recommendation No. 23*, *supra* note 18, art. 5.

<sup>61</sup> See *General Recommendation No. 23*, *supra* note 18.

<sup>62</sup> *Id.* art. 4.

<sup>63</sup> *Id.* art. 5.

<sup>64</sup> See Raja D. Roy, *Challenges for Judicial Pluralism & Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, 21 ARIZ. J. INT'L & COMP. L. 113, 161 n. 106 (2004).

application of the Racial Discrimination Convention to indigenous rights was often problematic. CERD generally discourages the specialized treatment of racial groups, and was thus seen by some as being “hostile to [the concept of] indigenous collective rights,”<sup>65</sup> which requires establishing policies that differentiate between indigenous and non-indigenous peoples. By creating a specialized set of guidelines for use when addressing indigenous issues, the General Recommendation allows CERD to monitor and investigate issues of indigenous rights in a manner sensitive to the special circumstances of indigenous peoples and encourages the notion of collective rights.

Passage of the General Recommendation signaled that CERD would hold States parties to a higher standard than that set by the Racial Discrimination Convention alone when addressing indigenous rights. While Article 5(c) of the Racial Discrimination Convention assures all people of the right to “take part” in the political process and public affairs,<sup>66</sup> the General Recommendation goes further by requiring that indigenous people have “effective participation in public life.”<sup>67</sup> Additionally, Article 4(d) of the General Recommendation requires that no decisions “directly relating to the rights of [indigenous peoples] are taken without their informed consent.”<sup>68</sup>

The standard of informed consent—or, as used in certain contexts, “free, prior and informed consent”<sup>69</sup>—is a concept that has gained traction in the discussion of indigenous rights within various U.N. forums, most notably the General Recommendation and the General Assembly Resolution on the Rights of Indigenous Peoples.<sup>70</sup> However, neither of these documents defines the term or determines what level of communication is required in order to satisfy the standard. The U.N. Economic and Social Council’s Permanent Forum on Indigenous Issues recognized that the “main operational elements” of free, prior, and informed consent require good faith

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(stating it is feared that if indigenous issues are analyzed under a traditional nondiscriminatory framework, it may hurt “indigenous peoples’ struggle for the direct recognition and acknowledgement of some of their most important collective rights like self-determination, and on self-government, lands, and resources.”).

<sup>65</sup> S. James Anaya, *Indigenous Rights, Local Resources and International Law: Divergent Discourses About International Law, Indigenous Peoples, and Rights Over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 237, 256-57 (2004).

<sup>66</sup> See Racial Discrimination Convention, *supra* note 13, art. 5(c).

<sup>67</sup> See General Recommendation No. 23, *supra* note 18, art. 4(d).

<sup>68</sup> *Id.*

<sup>69</sup> See Declaration on the Rights of Indigenous Peoples, *supra* note 23.

<sup>70</sup> *Id.*; see also General Recommendation No. 23, *supra* note 18, art. 4(d); see also ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND* 255 (2007) (stating that U.N. bodies have “gradually started referring to the requirement of consent, rather than consultation,” although mostly in relation to land issues).

and appropriate consultation with indigenous representatives chosen by those impacted by the policies.<sup>71</sup> Furthermore, it stated that the principle required that indigenous peoples be given at least a realistic chance of affecting the outcome of the decision, if not an outright veto of proposed initiatives.<sup>72</sup> In a different report, the Permanent Forum on Indigenous Issues summarized the notion of free, prior, and informed consent as “respect for the right to participate in decision-making.”<sup>73</sup> CERD used this concept in its criticism of Nigeria’s “failure to engage in meaningful consultation with the concerned communities”<sup>74</sup> that were impacted by its oil production activities. While far from easily applicable, the concept provides some framework for analyzing whether policies concerning indigenous peoples violate the Racial Discrimination Convention.<sup>75</sup>

The General Recommendation, in Article 5, also specifically recognized indigenous peoples’ right to control and use their land.<sup>76</sup> CERD’s recent role in addressing indigenous rights issues has principally been reserved for matters of indigenous land title issues. It is unclear whether this focus is due to the clear guidance provided by the General Recommendation via the specific attention it pays to land rights or whether it is a reflection of the importance placed on indigenous land title in the international struggle for indigenous rights.<sup>77</sup> Whatever the reason, CERD has primarily focused on land matters in its indigenous rights analyses.

## 2. *Recent CERD Decisions on Indigenous Land Title Combine the Nondiscrimination Norm with the General Recommendation’s Focus on Informed Consent and Indigenous Peoples’ Land Rights*

With the implementation of the General Recommendation, CERD created a framework that enables it to look more carefully at indigenous land issues. In particular, Article 4(d) of the General Recommendation imposes the requirement of informed consent, setting a higher bar when dealing with

<sup>71</sup> U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report on the Inter-Agency Support Group on Indigenous Issues on its 2004 Session*, ¶ 33, U.N. Doc. E/C.19/2005/2 (Feb. 14, 2005).

<sup>72</sup> *Id.*

<sup>73</sup> U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Information Received from the United Nations System*, ¶ 39, U.N. Doc. E/C.19/2005/4/Add.13 (Mar. 28, 2005).

<sup>74</sup> See CERD Concluding Observations on Nigeria, *supra* note 59, ¶ 19.

<sup>75</sup> For a thorough comparative analysis of various international standards for indigenous participation and consent, see XANTHAKI, *supra* note 70, at 252.

<sup>76</sup> See *General Recommendation No. 23*, *supra* note 18, art. 5 (calling on States parties to “recognize and protect the rights of indigenous people to own, develop, control and use their communal lands.”).

<sup>77</sup> See XANTHAKI, *supra* note 70, at 238 (stating that “the importance of recognizing indigenous land rights also underlies claims for equality and non-discrimination” and noting that CERD has addressed states which have enacted discriminatory land policies against indigenous peoples).

indigenous peoples' rights than exists under the Racial Discrimination Convention. Article 4(d) buttresses the generic and relatively mild language of Article 5(c),<sup>78</sup> furthering the right of participation guaranteed under Article 5(c). CERD's recent decisions regarding indigenous land title incorporated this higher standard into an analysis that combines the General Recommendation's requirement of informed consent and its emphasis on indigenous land rights with the nondiscrimination model of the Racial Discrimination Convention.

CERD began to apply a dual nondiscrimination-indigenous rights analysis in its 1999 decision regarding Australia's indigenous land policy.<sup>79</sup> In that decision, CERD found that Australia was in danger of breaching Articles 2 and 5 of the Racial Discrimination Convention, after it investigated a complaint filed under the early warning procedures.<sup>80</sup> The complaint asserted that the Native Title Act of 1998 ("Native Title Act") violated the Racial Discrimination Convention because it put the rights of non-Aboriginal land owners above those of Aboriginal land owners.<sup>81</sup> The Australian government maintained that the Native Title Act was enacted to "reconsider some of the provisions of the original Act"<sup>82</sup> that conflicted with a High Court decision holding that native title could exist on pastoral land.<sup>83</sup> However, the plan was seen by many as a mere revocation of the land rights obtained by indigenous Australians in the 1993 Act.<sup>84</sup>

CERD held that "while the original Native Title Act [of 1993] recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act."<sup>85</sup> In its decision, CERD further stated that "the lack of effective participation by indigenous communities in the formulation of the amendments . . . raises concerns" over Australia's compliance with Article

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<sup>78</sup> See *supra* Part II.B.1.

<sup>79</sup> See CERD Decision 2(54) on Australia, *supra* note 56.

<sup>80</sup> *Id.*; see also Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, 23 MELB. U. L. REV. 372, 373 (1999) (stating that CERD found the amended Act "might not comply with Articles 2 and 5 of the Racial Discrimination Convention" and also likely breached Articles 1(4) and 2(2) due to the "lack of effective participation by indigenous communities in the formulation of the amendments").

<sup>81</sup> See CERD Decision 2(54) on Australia, *supra* note 56, ¶ 6, (stating that "the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title").

<sup>82</sup> AUSTRALIAN GOVERNMENT'S COMMENTS ON DECISION 2(54) OF 18 MARCH 1999 ADOPTED BY CERD AT ITS 54TH SESSION, ¶ 5, (July 5, 1999), <http://www.austlii.edu.au/au/journals/AILR/1999/54.html> (last visited Jan. 20, 2008).

<sup>83</sup> *Id.* (discussing *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129).

<sup>84</sup> For a thorough discussion of the Native Title Amendment Act 1998, see Triggs, *supra* note 80, at 397.

<sup>85</sup> See CERD Decision 2(54) on Australia, *supra* note 56, ¶ 6.

5(c) of the Racial Discrimination Convention.<sup>86</sup> It then went on to cite the General Recommendation's emphasis on the recognition and protection of the rights of indigenous people to "own, develop, control and use their common lands, territories and resources."<sup>87</sup> Further, CERD expressed concern over "the lack of effective participation by indigenous peoples in the formulation of the amendments," specifically reminding Australia of the importance of informed consent per the General Recommendation.<sup>88</sup>

CERD applied a similar analysis when it used its early warning and urgent action procedures to investigate an allegation by the Western Shoshone indigenous peoples in the United States. In its decision on the matter, CERD expressed particular concern over the attempts to privatize and transfer Western Shoshone ancestral lands to energy companies and extractive industries.<sup>89</sup> Additional concern stemmed from the past and planned use of land that was culturally or spiritually significant to the Western Shoshone people for purposes ranging from a nuclear waste repository to open pit mining to underground nuclear testing.<sup>90</sup> Of key concern to CERD was that action had been taken or planned "without consultation with and despite protests of the Western Shoshone peoples,"<sup>91</sup> contrary to the General Recommendation's requirement of informed consent.

As in the Australian decision regarding the Native Title Act, CERD issued its decision on the United States using the same combined analysis of the nondiscrimination framework of the Racial Discrimination Convention and the indigenous rights framework of the General Recommendation.<sup>92</sup> Demonstrating the higher standard of informed consent, CERD urged the United States to "take immediate action to initiate a dialogue" with the Western Shoshone people in order to find a solution acceptable to them.<sup>93</sup> CERD also urged the U.S. government to find a solution that complied with the rights of the Western Shoshone under Articles 5 and 6 of the Racial Discrimination Convention.<sup>94</sup> In addition, the decision reminded the U.S. of the General Recommendation's requirement that States parties guarantee the right of indigenous people to "own, develop, control and use their communal lands, territories and resources."<sup>95</sup> The decision recommended that the

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<sup>86</sup> *Id.* ¶ 9.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See CERD Decision 1(68) on United States of America, *supra* note 56, ¶ 7(a).

<sup>90</sup> *Id.* ¶ 7(b)-(c).

<sup>91</sup> *Id.* ¶ 7(d).

<sup>92</sup> See *supra* notes 89-91 and accompanying text.

<sup>93</sup> See CERD Decision 1(68) on United States of America, *supra* note 56, ¶ 9.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (citing *General Recommendation No. 23*, art. 5).

United States delay the implementation of the activities planned on Western Shoshone ancestral lands until an agreement was reached that met the U.S. obligation under the Racial Discrimination Convention.<sup>96</sup> However, almost a year after the decision the U.S. government had yet to respond publically to the concerns raised therein.<sup>97</sup>

The CERD decisions on Australia and the United States demonstrate the effective use of the General Recommendation in analyzing indigenous land issues. CERD applied the higher standard of informed consent as a supplement to its analysis under the nondiscrimination norm of Article 5 of the Racial Discrimination Convention. This heightened level of scrutiny, combined with the General Recommendation's specific focus on land issues, allows CERD an increased capacity to respond to issues of indigenous land title. This special attention to indigenous rights issues, combined with the ability for impacted parties to directly appeal to CERD, puts CERD in a prime position to analyze and potentially challenge portions of Australia's NT Emergency Response Act.

### III. THE NT EMERGENCY RESPONSE ACT VIOLATES THE GENERAL RECOMMENDATION'S INFORMED CONSENT REQUIREMENT AND LAND USE STANDARDS

The quick passage of the NT Emergency Response Act ensured that there was little room for discussion or opportunity for indigenous peoples to participate in developing the proposed legislation. This directly contradicts CERD's requirement that any action directly impacting indigenous peoples must be taken with their informed consent and effective participation.<sup>98</sup> Additionally, aspects of the land provisions enacted by the NT Emergency Response Act are in opposition to CERD's promotion of indigenous use, control, and ownership of their communal lands.<sup>99</sup> CERD is likely to find that the limited level of communication between the Australian government and indigenous peoples prior to the passage of the Act renders the entire Act in violation of Australia's duties under the Racial Discrimination Convention. Moreover, it is likely to find that the land provisions are an especially egregious violation as they directly contradict CERD's indigenous land policies.

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<sup>96</sup> *Id.* ¶ 10.

<sup>97</sup> Oxfam America, *Oxfam Urges End to 'Injurious Problem' Native Americans Face Over Land Rights*, [http://www.oxfamamerica.org/whatwedo/where\\_we\\_work/united\\_states/news\\_publications/news\\_update.2007-01-29.0309306996/?searchterm=shoshone%20AND%20cerd](http://www.oxfamamerica.org/whatwedo/where_we_work/united_states/news_publications/news_update.2007-01-29.0309306996/?searchterm=shoshone%20AND%20cerd) (last visited Jan. 20, 2008).

<sup>98</sup> See *General Recommendation No. 23*, *supra* note 18, art. 4(d).

<sup>99</sup> *Id.* art. 5.

A. *A Challenge Brought to CERD Based on the Lack of Informed Consent During the Passage of the NT Emergency Response Act Would Likely Succeed*

The General Recommendation does not define informed consent, nor does it set a minimum level of interaction required to meet the standard. While this signals a gap in CERD's policy—and indeed in the policy of the broader U.N. system—the situation surrounding the NT Emergency Response Act's passage makes it fairly apparent that the Australian government allowed only very limited, and rather meaningless, participation on the part of indigenous peoples throughout the development and passage of the Act. Additionally, the Act ended ongoing discussions between the government and indigenous groups on many of the issues that the Act addressed. CERD will likely look unfavorably on the Act because its passage halted processes which CERD seeks to protect—informed participation by indigenous groups—and instead implements legislation which unfairly foists the government's will upon Aboriginal groups.

1. *The Lack of Indigenous Participation in the Creation and Passage of the NT Emergency Response Act Likely Violates the Informed Consent Provision of the General Recommendation*

CERD is apt to regard the entire NT Emergency Response Act and its companion bills with a heightened level of suspicion due to the lack of communication that took place between the Australian government and the impacted Aboriginal peoples and communities. The context of the Act's passage is important in this regard. The short time frame from the bill's introduction until its passage precluded meaningful dialogue between the government and the impacted indigenous communities.<sup>100</sup> The NT Emergency Response Act was proposed by Prime Minister Howard, without any apparent input on the part of indigenous peoples or communities. A little more than a week after Prime Minister Howard introduced the 500 page legislative package on August 17, 2007, Parliament passed the bill.<sup>101</sup>

The implementation of the General Recommendation allows CERD to apply the higher standard of informed consent when analyzing the level of indigenous participation in matters that impact indigenous peoples.<sup>102</sup>

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<sup>100</sup> See Pritchard, *supra* note 12, ¶¶ 31-33 (stating that the House of Representatives passed the bills in a single afternoon, less than twenty-four hours after their introduction, and the Senate approved the bill less than one week later.).

<sup>101</sup> *Id.* ¶ 31.

<sup>102</sup> *Supra* note 66-68 and accompanying text.



Because Parliament passed the NT Emergency Response Bill at breakneck speed, it is very unlikely CERD would find that the discourse which did occur would satisfy even the lesser standard of Article 5(c) of the Racial Discrimination Convention, which ensures the right to “take part” in the political process and public affairs.<sup>103</sup> Even if CERD determines that Article 5(c) was satisfied, however, Article 4(d) of the General Recommendation sets a higher bar of informed consent and effective participation that would almost certainly not be met by the government’s limited interaction with indigenous peoples prior to the bill’s introduction or passage. “Consultation not in good faith or without intending to address the concerns of the indigenous community falls below” the informed consent standard.<sup>104</sup> Even without a clear definition of what constitutes informed consent, discussion with impacted indigenous groups alone will likely not be sufficient to meet the standard.

Indeed, it appears that the Australian government did not even meet the lower standard of consultation. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, noted the limited role the indigenous community played in the creation of the plan.<sup>105</sup> Calma thought it “intentional that the government has described its announcements as an ‘intervention’ as opposed to a ‘partnership’ with indigenous communities,”<sup>106</sup> and questioned why the government’s relationship with the communities was not strong enough to allow it to approach the situation as a partnership.<sup>107</sup> The classification as an “intervention” does not mesh with the idea of informed consent, and is precisely the sort of action that is disfavored in the General Recommendation. Australia will have a difficult time asserting that the bill was passed with informed consent when at the time of the Act’s passage local newspaper stories reported that “regional Aboriginal spokesmen . . . have condemned the sweep and effects of the plan.”<sup>108</sup>

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<sup>103</sup> See Racial Discrimination Convention, *supra* note 13, art. 5(c).

<sup>104</sup> See XANTHAKI, *supra* note 70, at 255-56 (discussing the lower standards of other international entities).

<sup>105</sup> Tom Calma, Comm’r, Aboriginal and Torres Strait Islander Soc. Just. Comm’n, Speech: Continuity and Change Through New Arrangements—Lessons for Addressing the Crisis of Child Sexual Abuse in the Northern Territory (July 3, 2007), *available at* [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2007/continuity\\_change2007.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2007/continuity_change2007.html).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Nicolas Rothwell, *Desert Sweep*, THE AUSTRALIAN, Aug. 11, 2007, *available at* <http://www.theaustralian.news.com.au/story/0,25197,22223488-28737,00.html>; *see also*, Tara Ravens, *Aboriginal Leaders Condemn Child Abuse Plan*, THE AUSTRALIAN, Aug. 4, 2007, *available at* <http://www.theaustralian.news.com.au/story/0,25197,22189204-1702,00.html>.

The lack of support from the indigenous community, combined with the quick passage and lack of opportunity for indigenous input will likely trouble CERD. In short, the situation surrounding the Act's passage meets none of the guidelines described by the Permanent Forum on Indigenous Issues.<sup>109</sup> Furthermore, it is arguable whether the Howard administration was acting in good faith when it disguised the far-reaching reforms as an effort to combat sexual abuse of children. The severely limited consultation of indigenous peoples during the drafting and passage of the bill is similarly troubling, as is the lack of attention that was paid to previous suggestions created with the indigenous peoples' input. It is unlikely that CERD would find that consultation was "undertaken in a manner appropriate to the circumstances and through appropriate procedures,"<sup>110</sup> or that the Act's speedy passage ensured that Aboriginal peoples had "a realistic chance of affecting the outcome."<sup>111</sup> For these reasons, it is likely that the entire Act's passage was not in compliance with Article 5(c) of the Racial Discrimination Convention's participation requirements or the General Recommendation's higher standard of effective participation and informed consent requirements under Article 4(d).<sup>112</sup>

2. *The Land Title Provisions Ended Ongoing Discussions with Indigenous Peoples and Communities, Evincing a Violation of Article 5 of the Racial Discrimination Convention and Article 4(d) of the General Recommendation*

While CERD is likely to question the entire NT Emergency Response Act for the lack of participation and consent on the part of indigenous peoples affected by the legislation, the land title portion merits special focus. This portion effectively ended, or at the very least substantially changed the balance of, two ongoing negotiations involving indigenous peoples who were likely to be impacted by proposed policies.

Debate has been ongoing since 1998 over the possibility of compulsorily taking Aboriginal land for public purposes, and the NT Emergency Response Act has brought these concerns to the forefront once more.<sup>113</sup> In 2005, Prime Minister Howard stated that "there is a case for

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<sup>109</sup> See *supra* notes 71-72 and accompanying text.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Racial Discrimination Convention, *supra* note 13, art. 4(d).

<sup>113</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 25.

reviewing the whole issue of Aboriginal land title.”<sup>114</sup> Previous proposals suggested the Commonwealth should compulsorily acquire, for a term of ninety-nine years, leases of this land which is currently communally held.<sup>115</sup> The acquisition was part of a broader plan to sublease the land back as “private land” to encourage Aboriginal home ownership.<sup>116</sup> At first glance, this policy might appear to be in line with CERD’s emphasis on indigenous land title, as it is putting home ownership in the hands of indigenous peoples. However, there is a fear that, as one Aboriginal leader, Noel Pearson, speculated, “the legitimate issue of home ownership might be used as a Trojan horse for a reallocation of land rights—a taking of rights away from Aboriginal people.”<sup>117</sup> Even if the fears that the lease terms will be extended prove unfounded, CERD is unlikely to support even a five-year lease assumption plan that was developed without indigenous participation.

In recent years, tensions between the Commonwealth and NT governments have arisen in connection with the debate over how to settle the issue of land title.<sup>118</sup> The NT government favored a voluntary plan where traditional owners could choose to lease communally held land.<sup>119</sup> Indeed, the lease acquisition provision of the NT Emergency Response Act goes against the Commonwealth’s own stated goal of using “involuntary measures” only as a last resort.<sup>120</sup> While the five-year lease in the Act might be seen as a compromise when compared to past proposals pushing for ninety-nine year leases, this is nonetheless a compromise the government imposed on Aboriginal communities without their input.<sup>121</sup>

The NT Emergency Response Act also severed ongoing negotiations with the Alice Springs town camps over subleasing the housing areas of the

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<sup>114</sup> John Howard, Australian Prime Minister, *Doorstop Interview*, Wadeye, NT, (Apr. 6, 2005), <http://www.pm.gov.au/news/interviews/Interview1305.html> (last visited Dec. 1, 2007).

<sup>115</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 28; see also Martin Mowbray, *Redefining Land Rights: The Review of the Aboriginal Land Rights (Northern Territory) Act, 1976*, 4:18 INDIGENOUS LAW BULL., 9, available at <http://www.austlii.edu.au/au/journals/ILB/1999/13.html> (discussing John Reeves’ *Review of the Aboriginal Land Rights (Northern Territory) Act 1976, Building on Land Rights for the Next Generation* and stating that Reeves’ proposal would allow a Northern Territory governmental body to intervene in decisions of use of aboriginal land, if it became necessary).

<sup>116</sup> PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 24.

<sup>117</sup> Australians for Native Title & Reconciliation, *Land Title Under Threat*, [http://www.antar.org.au/index.php?option=com\\_content&task=view&id=94&Itemid=104](http://www.antar.org.au/index.php?option=com_content&task=view&id=94&Itemid=104) (last visited Jan. 2, 2008) (citing *Pearson Warns PM on Home Title Fears*, THE AUSTRALIAN, Apr. 14, 2005).

<sup>118</sup> PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 27-29.

<sup>119</sup> *Id.* at 25.

<sup>120</sup> Statement by Magistrate Sue Gordan, Chairperson, National Indigenous Council, *Indigenous Land Tenure Principles*, reprinted in ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, NATIVE TITLE REPORT 2005 Annexure 2 (June 3, 2005), [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport05/app2.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport05/app2.html) (last visited Jan. 20, 2008).

<sup>121</sup> See *supra* notes 105-111 and accompanying text.

town camps to the NT government.<sup>122</sup> Under the NT Special Purposes Leases Act, the NT government granted leases in perpetuity to entities that would administer town camps in the NT.<sup>123</sup> These town camps—areas bordering urban centers yet separated from nearby suburban residential areas—were created to accommodate the stream of Aboriginal Australians moving to towns from villages.<sup>124</sup>

Prior to the passage of the NT Emergency Response Act, the Northern Territory Minister or the Administrator of the camp could, by proclamation, revoke “any land comprising, or included in, a lease . . . for any public purpose which he thinks fit.”<sup>125</sup> The NT Emergency Response Act expands the authority to revoke these leases to the federal government.<sup>126</sup> This expansion came after the federal government’s failed attempt to pressure the NT government to use its powers to assume management of the town camps.<sup>127</sup>

After the passage of the NT Response Emergency Act, Mal Brough, the Minister for Families, Community Services, and Indigenous Affairs, interpreted the new provisions as allowing for three options to obtain control over town camps: acquiring management of the town camps, taking back the leases two months after warning the leaseholders that they might be in violation of the terms of the lease, or “declaring the camps to be in breach of the lease conditions and declaring the leases to be forfeit[ed].”<sup>128</sup> By passing the town camps section of the NT Emergency Response Act, the Commonwealth government strengthened its bargaining position in the ongoing debate over town camps. It can now threaten to take federal action in order to achieve its original goal of getting the NT government to assume management responsibilities of the property.

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<sup>122</sup> Mal Brough, Minister for Families, Community Services and Indigenous Affairs, Speech for the Second Reading of the NT Emergency Response Bill (Aug. 7, 2007), [http://www.facs.gov.au/internet/minister3.nsf/content/nter\\_bill\\_7aug07.htm](http://www.facs.gov.au/internet/minister3.nsf/content/nter_bill_7aug07.htm) (last visited Jan. 2, 2008).

<sup>123</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 29; see also NT Special Purposes Leases Act, 2005 (Austl.), available at [http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/8097221e5f915c40692570e70007cbf5/\\$FILE/Reps012.pdf](http://notes.nt.gov.au/dcm/legislat/legislat.nsf/d989974724db65b1482561cf0017cbd2/8097221e5f915c40692570e70007cbf5/$FILE/Reps012.pdf).

<sup>124</sup> W. SANDERS, CENTRE FOR ABORIGINAL ECONOMIC POLICY RESEARCH, INDIGENOUS PEOPLES IN THE ALICE SPRINGS TOWN CAMPS: THE 2001 CENSUS DATA 1 (2004), available at [http://www.anu.edu.au/caepr/Publications/DP/2004\\_DP260.pdf](http://www.anu.edu.au/caepr/Publications/DP/2004_DP260.pdf); see also Tangentyere Council website, <http://www.unesco.org/most/oceania1.htm> (last visited Jan. 20, 2008).

<sup>125</sup> NT Special Purposes Leases Act, 2005, § 28(a) (Austl.).

<sup>126</sup> See NT Emergency Response Act, *supra* note 5, part 4(2)(A)(44).

<sup>127</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 29.

<sup>128</sup> Simon Kearney, *Landholders Up in Arms at Prospect of Losing Their Property*, THE AUSTRALIAN, Aug. 14, 2007, at 4, available at <http://www.theaustralian.news.com.au/story/0,25197,22241125-5006790,00.html>.

Even if a voluntary agreement is reached, CERD might look unfavorably on the strong-arm tactics the Commonwealth government used to reach the agreement. The Commonwealth's threat to utilize its new powers of acquisition diminishes the free will of the indigenous groups that currently operate and manage the town camps. Instead of allowing affected indigenous peoples to continue negotiations and determine the best way to manage town camps while providing a decent living environment for Aboriginal peoples living in town camps, the Commonwealth government unilaterally imposed its plan. Furthermore, there is evidence that the indigenous peoples affected are unhappy with the changes made by the town camps provision.<sup>129</sup>

Ending or putting undue pressure on these ongoing negotiations by imposing the Commonwealth government's legislative will is likely to be looked upon unfavorably by CERD. The negotiations and dialogue that occurred with indigenous peoples prior to the Act's passage were in the spirit of the General Recommendation's emphasis on informed consent. This dialogue would likely have satisfied the General Recommendation's informed consent provision, as the input of those indigenous peoples who would be affected by the legislation was solicited and included. CERD is likely to find that by ending indigenous peoples' participation in the process impacting their rights, Australia violated Article 5(c) of the Racial Discrimination Convention. CERD is almost certain to find that ending the negotiations with indigenous peoples and imposing the Howard administration's will is not in line with Section 4(d) of the General Recommendation, requiring effective participation and informed consent.<sup>130</sup>

3. *Other Provisions of the NT Emergency Response Act Also Ignored Previous Recommendations Made with Indigenous Participation*

The drafters of the NT Emergency Response Act disregarded previous recommendations made with indigenous peoples' participation and support. For example, collaboration between the Aboriginal and Torres Strait Islander Commission ("ATSIC") and the North West Regional Governing Councils of the NT resulted in the 2004 Family Violence Policies and Action Plans.<sup>131</sup> This plan, which was developed in conjunction with indigenous peoples and organizations, but never implemented or funded by the Howard

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<sup>129</sup> *Id.*; see also *Australians for Native Title & Reconciliation*, *supra* note 117.

<sup>130</sup> See *General Recommendation No. 23*, *supra* note 18, art. 4(d).

<sup>131</sup> See *Calma*, *supra* note 105.

administration,<sup>132</sup> is in many ways more in line with CERD's policies than the NT Emergency Response Act, particularly in the importance it placed on community participation and ownership of any adopted plan.<sup>133</sup> The suggestions made in the plan were ignored and not taken into account when the administration developed the NT Emergency Response Act.<sup>134</sup>

That the government ignored the above recommendations will likely concern CERD. It provides yet another example of the Commonwealth imposing policies on indigenous peoples without taking into account past proposals made with indigenous peoples' input.

*B. CERD Will Likely Find That the Land Title Provisions of the NT Emergency Response Act Violate the Land Use Standards Set by Article 5 of the General Recommendation*

Ensuring land title rights is an important topic generally in the international debate over indigenous rights.<sup>135</sup> This is reflected in the General Recommendation's focus on indigenous land rights<sup>136</sup> and in CERD's past decisions.<sup>137</sup> Under the General Recommendation's guidelines, the provisions in the NT Emergency Response Act that allow the Commonwealth government to assume title of land that was previously under the control of Aboriginal entities or communities conflict with CERD's emphasis on allowing indigenous peoples to manage their own land.<sup>138</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See id.* ("We are not starting from scratch in dealing with this issue—despite the rhetoric.").

<sup>135</sup> *See* XANTHAKI, *supra* note 70, at 237 (stating that due to the strong connection many indigenous communities have to their land, "land rights are the central claim in their struggle for more protection").

<sup>136</sup> *See General Recommendation No. 23, supra* note 18, art. 5.

<sup>137</sup> *See* CERD Decision 2(54) on Australia, CERD Decision 1(66) on New Zealand, and CERD Decision 1(68) on United States of America, *supra* note 56 and accompanying text.

<sup>138</sup> *See* NT Emergency Response Act, *supra* note 5, part 4(1)(A)(31)(1)(b)(i) (allowing the government to acquire five-year leases over townships on Aboriginal land, defined as being "within the meaning of the definition of *Aboriginal land* in subsection 3(1) of the *Aboriginal Land Rights (NT) Act 1976*." (emphasis in original)); NT Emergency Response Act, *supra* note 5, part 4(2) (allowing the Commonwealth to reacquire leases that were previously granted to various entities in perpetuity for the purpose of administering Aboriginal town camps); PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 18, 24 (Aug. 7, 2007).

1. *The Act Violates the General Recommendation's Emphasis on the Right of Indigenous Peoples to Own and Control Their Communal Land*

The Australian government stresses that the NT Emergency Response Act does not extinguish native title, although it does concede that certain native title rights will be suspended as part of the five-year lease acquisition.<sup>139</sup> It is likely that CERD will find that this suspension of native title is contrary to the right of indigenous peoples to own property set out in the General Recommendation.<sup>140</sup> It is even more likely that CERD will view this suspension of title as being incompatible with the right of indigenous peoples to control their communal land, as required by Article 5 of the General Recommendation.<sup>141</sup> Moreover, CERD's past decisions demonstrate that its concern extends beyond just the extinguishment of native title. In 1999 it criticized Australia for legislation that "impair[ed] the exercise of indigenous title rights and interests,"<sup>142</sup> even though title was not fully extinguished.

Compulsory acquisition of leases on Aboriginal lands, even if only for five years, substantially impacts Aboriginal peoples' ability to control their communal land. Further violations of the Racial Discrimination Convention may be found if the acquisition of leases is in fact a Trojan horse, designed to allow the government to implement an individual home ownership program on communal land.<sup>143</sup> If this is the case, Aboriginal peoples' rights to develop, control, and use their communal lands will also be impaired, in direct violation of Article 5 of the General Recommendation.

Furthermore, the provision regarding management of town camps is contrary to the land title provision of the General Recommendation. The government is threatening to assume control of land that is currently managed by an organization on behalf of numerous Indigenous Corporations.<sup>144</sup> Supplanting indigenous control with federal control of public land management does not comport with either the purpose or the language of the General Recommendation or Racial Discrimination Convention.

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<sup>139</sup> See Brough, *supra* note 122.

<sup>140</sup> See *General Recommendation No. 23*, *supra* note 18, art. 5.

<sup>141</sup> *Id.* ("Especially call[ing] upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.").

<sup>142</sup> See CERD Decision 2(54) on Australia, *supra* note 56, ¶ 6.

<sup>143</sup> See *Australians for Native Title & Reconciliation*, *supra* note 117.

<sup>144</sup> See Kearney, *supra* note 128.

The land title provisions of the NT Emergency Response Act are directly contrary to the General Recommendation's promotion of indigenous control, use, and ownership of communal land. The Act removes indigenous control, instead putting the federal government in charge of previously communal lands—a policy that CERD is likely to disapprove of.

2. *The NT Emergency Response Act's Requirement of "Reasonable Compensation" for Indigenous Land Acquired May Also Violate the Racial Discrimination Convention*

The NT Emergency Response Act created a new method of reimbursement for property acquired by the government. Ordinarily, the governmental acquisition of land would require that land owners receive "just terms" for their lost property.<sup>145</sup> However, the NT Emergency Response Act removes the requirement of just compensation for any land obtained through the Act, instead applying a new standard—a "reasonable amount of compensation."<sup>146</sup> While it has yet to be seen what the difference is, if any, between just compensation and a reasonable amount of compensation, it is potentially troubling that a different standard would be used when determining the value of Aboriginal land. Sarah Pritchard, an Australian legal scholar, notes that the "legislation has been drafted to avoid, to the extent possible, the obligation to compensate Aboriginal people in the Northern Territory [and to] ensure that as little, if any, monetary compensation will be paid. The discrimination in this approach is manifest."<sup>147</sup> Regardless of the way in which the "just compensation" system is implemented, CERD will likely be concerned with Australia's creation of a disparate structure for use only when compensating the taking of Aboriginal land in the NT.

Under the General Recommendation, payment for indigenous land is to be used as a last resort and only when it is "for factual reasons not possible" to return taken lands.<sup>148</sup> The Australian government's willingness to offer monetary restitution is likely to be unappreciated by CERD, as the General Recommendation says that compensation for taken land should "as far as possible, take the form of lands and territories."<sup>149</sup> The government's

<sup>145</sup> Northern Territory (Self-Government) Act, 1978, § 50(2) (Austl.).

<sup>146</sup> NT Emergency Response Act, *supra* note 5, part 4(4)(60)(1)-(2) (Austl.); *see also* PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 15 ("In lieu of a provision that reflects the standard Constitutional position a new formula which has not been the subject of judicial scrutiny in this context is being proposed.").

<sup>147</sup> *See* Pritchard, *supra* note 12, ¶ 63.

<sup>148</sup> *See* General Recommendation No. 23, *supra* note 18, art. 5.

<sup>149</sup> *Id.*



arguably unnecessary acquisition of land, in exchange for only monetary relief, is potentially a violation of Australia's obligations under Article 5 of the General Recommendation.

IV. A COMBINED ANALYSIS OF INFORMED CONSENT AND THE  
NONDISCRIMINATION NORM SHOULD BE USED TO ANALYZE NON-LAND  
CLAIM PROVISIONS

CERD should expand its use of the General Recommendation, particularly its focus on informed consent, and apply it to non-land use issues impacting indigenous people. The NT Emergency Response Act's mixture of land title and non-land title issues provides a good forum for expanding CERD's use of the General Recommendation. The NT Emergency Response Act legislates on a wide range of topics, but in the interest of space this Comment will only discuss two provisions: first, the provision on banning alcohol<sup>150</sup> and pornographic materials<sup>151</sup> in many areas of the predominantly indigenous NT region;<sup>152</sup> and second, the provision allowing the government to withhold portions of certain people's welfare checks.<sup>153</sup> The General Recommendation is not as directly applicable to these non-land provisions as it is to the land title and use provisions, as there is no directly applicable provision of the General Recommendation as exists for land rights. For that reason, CERD should combine the nondiscrimination emphasis of the Racial Discrimination Convention with the General Recommendation's specialized emphasis on indigenous rights and informed consent. In so doing, CERD will be equipped with a powerful framework to evaluate whether indigenous rights are threatened by the NT Emergency Response Act.

A. *The Automatic Withholding of Portions of Indigenous Peoples' Welfare Payments Is Not a "Special Measure" Under the Racial Discrimination Convention*

Portions of the Social Security and Other Legislation Amendment ("Welfare Payment Reform"), one of the bills included in the NT Emergency Response Act package, likely violate the Racial Discrimination Convention. Under Australian law, those who qualify have an inalienable right to welfare

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<sup>150</sup> See NT Emergency Response Act, *supra* note 5, part 2(2).

<sup>151</sup> See Families, Community Services & Indigenous Affairs Act, *supra* note 5, schedule 1.

<sup>152</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 36 n. 43 (stating that the "prescribed areas" are the same for both the ban on alcohol and pornography).

<sup>153</sup> See Welfare Payment Reform Act, *supra* note 5.

payments, including income support, income supplements, and family assistance payments.<sup>154</sup> The Income Management Regime (“IMR”) created by the Act will remove the right from individuals otherwise qualified to receive payments and allow the government to withhold “[a] substantial slice of welfare payments [to] be quarantined for food and other necessities.”<sup>155</sup>

The IMR will apply on a case-by-case basis when deemed necessary for the protection of a recipient’s child,<sup>156</sup> when the recipient’s child is not enrolled in school<sup>157</sup> or does not satisfactorily attend school,<sup>158</sup> or if the Queensland Commission requests the provision apply to a person under their jurisdiction.<sup>159</sup> Additionally, it applies to all persons who are “resident[s] of a specified area in the Northern Territory,”<sup>160</sup> which includes those areas labeled prescribed areas under the NT Emergency Response Act which are defined, in part, as “Aboriginal land.”<sup>161</sup> While exemptions to the IMR may be made for certain people living in the prescribed areas,<sup>162</sup> it is presumed to apply to all those living in the predominantly indigenous areas prescribed by the Act, regardless of an individual showing that such restrictions are necessary. Furthermore, the right to appeal is denied to those living in the relevant areas of the NT, essentially denying an important protection to, as Ms. Pritchard notes, “an entire group of Australians based on where they live, and indirectly their Aboriginality.”<sup>163</sup>

The Commonwealth government acknowledges that the provisions are discriminatory<sup>164</sup> but it attempts to preempt judicial scrutiny by claiming that they are “special measures” for the purposes of Australia’s Racial Discrimination Act.<sup>165</sup> Regardless of whether that declaration is successful

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<sup>154</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 17 (stating that inalienability requires that where a person is qualified to a payment and entitled to an amount of payment, the payment is their legal right).

<sup>155</sup> See Brough, *supra* note 122.

<sup>156</sup> See Welfare Payment Reform Act, *supra* note 5, schedule 1(123)(UC)(30).

<sup>157</sup> *Id.* schedule 1(123)(UD)(31-33).

<sup>158</sup> *Id.* schedule 1(123)(UE)(33-34).

<sup>159</sup> *Id.* schedule 1(123)(UF)(34-35).

<sup>160</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 18.

<sup>161</sup> *Id.* schedule 1(123)(TD)(a)(22); see *infra* note 170 and accompanying text (defining prescribed areas, in part, as “aboriginal lands”).

<sup>162</sup> See Welfare Payment Reform Act, *supra* note 5, schedule 1(123)(UG)(35-37).

<sup>163</sup> See Pritchard, *supra* note 12, ¶ 73.

<sup>164</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 8 (stating that the legislation “treats people differently on the grounds of race (the reliance on geographic location as the feature differentiating among Australian residents would fall within the definition of prohibited ‘indirect discrimination’)”).

<sup>165</sup> See Welfare Payment Reform Act, *supra* note 5, § 4; see also PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 9 (stating that “the Bill is not proposing to allow judicial scrutiny of the question

in bypassing the Australian courts, it will not satisfy CERD, which will not merely accept the Australian government's pronouncement that the provisions constitute "special measures" under Article 1(4), but rather will independently analyze the matter. CERD should look at this provision all the more vigilantly because of the possibility that the Australian courts' jurisdiction to address the issue was revoked by the Act.<sup>166</sup>

Based on a strict nondiscrimination norm, the blanket application of the Welfare Payment Reform provision to all persons living on Aboriginal lands likely surpasses the allowable discrimination of a special measure.<sup>167</sup> The provisions are not narrowly tailored to directly target the child abuse of Aboriginal children; instead, they widely affect all persons living on Aboriginal land, regardless of whether they are implicated in child abuse. To provide further fodder for criticism, the Act creates a method to analyze, on a case-by-case basis, whether withholding welfare payments is appropriate for people not living on Aboriginal lands. The Commonwealth likely will not be able to justify a disparate policy that allows for an individualized analysis for non-Aboriginal peoples, but fails to do the same for people living on Aboriginal lands.

Combining the nondiscrimination norm with the informed consent provision of the General Recommendation would result in a more effective model to address whether the Welfare Payment Reform constitutes a special measure. Such an analysis would enable CERD to solidify the principles of informed consent by averring that no policy pertaining to indigenous peoples taken without their active support can ever constitute a special measure. The CERD analysis of the Welfare Payment Reform provision would depend, to a large extent, on what its investigation discovered regarding the involvement of indigenous peoples in creating the Welfare Payment Reform. Due to the lack of indigenous peoples' participation throughout the development and passage of the bill and the negative reaction to the bill, CERD will likely find that the blanket application of the IMR to all residents of indigenous areas in the NT does not constitute a special measure under Article 1(4). Thus, the provision will be unable to withstand scrutiny under the combined informed consent and nondiscrimination model.

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as to whether the measures qualify as a special measure, pre-empting the matter with the declaration that they are a special measure").

<sup>166</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 9.

<sup>167</sup> See Racial Discrimination Convention, *supra* note 13, art. 1(4) (stating that policies "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals . . . shall not be deemed racial discrimination").

B. *A Combined Analysis Demonstrates That the Ban on Alcohol and Pornographic Materials Cannot Be Considered a "Special Measure"*

The Act bans the "consumption, possession, or supply of liquor"<sup>168</sup> and pornographic materials<sup>169</sup> within prescribed areas. Prescribed areas are defined, in part, as those areas "covered by paragraph (a) of the definition of *Aboriginal land* in subsection 3(1) of the *Aboriginal Land Rights (NT) Act 1976*."<sup>170</sup> Further evidence that these bans are intended to apply primarily to Aboriginal peoples come from the exceptions allowed under the Act, as people engaged in commercial fishing or recreational boating activities are exempted from the alcohol ban.<sup>171</sup>

The NT Response Emergency Act is not the first time Australia has restricted the sale of alcohol to indigenous peoples. In 1995, the Australian Human Rights and Equal Opportunity Commission affirmed "the right of Aboriginal communities to demand restrictions on the distribution of alcohol for the benefit of their communities."<sup>172</sup> In 1996, the communities of Pitjantjarra and the proprietors of a roadhouse worked with the Commissioner of Australia's Human Rights and Equal Opportunity Commission to facilitate such an arrangement.<sup>173</sup> CERD never addressed whether that ban constituted a special measure, which could mean either that CERD approved of the practice, or was ignorant of it.

It is likely that had CERD been aware of the practice, it would have found the Pitjantjarra restriction to be an allowable exception under Article 1(4). The notable difference between that restriction and those created by the NT Emergency Response Act is the participation of those involved. In the case of the Pitjantjarra ban, the solution was reached with the participation, and indeed at the behest of, the indigenous communities involved.<sup>174</sup> Alcohol is a serious problem for many indigenous communities in Australia, and few would argue with the proposition that decreasing consumption in these areas is a laudable goal. Indeed, Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma notes that the

<sup>168</sup> See PARLIAMENTARY SERVICES BILLS DIGEST, *supra* note 6, at 23; see NT Emergency Response Act, *supra* note 5, part 2(12)(2).

<sup>169</sup> See Families, Community Services & Indigenous Affairs Act, *supra* note 5, schedule 1.

<sup>170</sup> See NT Emergency Response Act, *supra* note 5, part 4(1)(b)(1); see also Families, Community Services and Indigenous Affairs Act, *supra* note 5, schedule 1 (defining prescribed area as having "the same meaning as in the *Northern Territory Emergency Response Act 2007*") (emphasis in original).

<sup>171</sup> NT Emergency Response Act, *supra* note 5, part 2(12)(3).

<sup>172</sup> Human Rights & Equal Opportunity Comm'n, 1996-1997 *Human Rights and Equal Opportunity Comm'n Ann. Rep.* 107, available at [http://www.hreoc.gov.au/word/annual\\_reports/ar97.doc](http://www.hreoc.gov.au/word/annual_reports/ar97.doc).

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

question of whether a ban on alcohol may be classified as a special measure under Australian anti-discrimination law, which is heavily based on the Racial Discrimination Convention,<sup>175</sup> “might in fact be contingent upon whether the condition or restriction was at the request of the community.”<sup>176</sup> CERD is likely to take a similar view, as the General Recommendation appears to reflect a desire that a solution, even if promoting a notable purpose, not be foisted on indigenous peoples.<sup>177</sup>

It is possible that under a strict nondiscrimination norm, CERD might allow the NT Emergency Response Act’s restriction on alcohol as a special measure that is narrowly tailored to the aim of improving the social conditions of indigenous peoples. However, with the combined analysis of nondiscrimination and informed consent, CERD should reject this provision and require the Australian government to work with the affected communities in developing any necessary restrictions on alcohol or pornographic materials. Not only is this a more fair, less paternalistic model, but a policy developed with the input of those affected and knowledgeable of the situation at hand is likely to be more effective.

CERD has successfully applied the General Recommendation to indigenous land title issues, and it should take a cue from this precedent and extend this practice to non-land title matters as well. Applying a combined approach allows CERD to address those non-land use issues that the General Recommendation does not specifically address, while still using the General Recommendation to provide a framework that is sensitive to indigenous rights issues. Using this combined analysis, CERD should find that the non-land title provisions of the NT Emergency Response Act violate the Racial Discrimination Convention and the General Recommendation.

## V. CONCLUSION

CERD should expand its current use of the General Recommendation by combining it with the nondiscrimination norm of the Racial Discrimination Convention to create a model that is specialized to address the unique needs of indigenous peoples. By applying this combined analysis

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<sup>175</sup> See Garth Nettheim, *The Relevance of International Law*, in *ABORIGINES & THE LAW* 50, 56 (Peter Hanks & Bryan Keon-Cohen, eds., 1984) (stating Parliament enacted the Racial Discrimination Act, 1975 (Cth.) to fulfill its obligations under the Racial Discrimination Convention).

<sup>176</sup> Tom Calma, Comm’r, Aboriginal and Torres Strait Islander Soc. Just. Comm’n, Speech: Implications of the Racial Discrimination Act 1975 with Reference to State and Territory Liquor Licensing Legislation (Oct. 28, 2004), <http://www.hreoc.gov.au/about/media/speeches/race/2004/LiquorLicensingAuthoritiesConference.html> (last visited Jan. 2, 2008).

<sup>177</sup> See *General Recommendation No. 23*, *supra* note 18, art. 4(d) (stating that no decisions directly relating to indigenous peoples’ rights and interests should be taken without their informed consent).

model, CERD should find that the NT Emergency Response Act violates the premise of the Racial Discrimination Convention and ask that Australia reevaluate its policies pertaining to indigenous peoples in the NT. CERD may not have a formal enforcement mechanism, but it does have over forty years of experience as an effective and fair forum for the investigation of discriminatory practices. There is a concern that if CERD, or another U.N. body, does not consider the question of whether the NT Emergency Response Act is discriminatory, no one will. The Act was written to preempt Australian courts and avoid judicial scrutiny, and even if Australian courts choose to address the Act's legality, such analysis will likely be limited to the nondiscrimination norm laid out in the Racial Discrimination Convention. Australian antidiscrimination law is modeled directly on the language of the Racial Discrimination Convention,<sup>178</sup> and is thus similarly limited. Unlike CERD, Australian courts do not have in their arsenal the specialized guidelines, particularly the requirement of informed consent, provided by the General Recommendation. Given its ability to apply a combined analysis, CERD is in a unique position to analyze the legality of the NT Emergency Response Act.

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<sup>178</sup> See Nettheim, *supra* note 175.